(6)

No. 04-433

In The
Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA,
and NATIONAL STEEL SUPPLY, INC.,

Petitioners,

v.

IDEAL STEEL SUPPLY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT

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RULE 29.6 STATEMENT

Respondent, Ideal Steel Supply Corporation, is a privately owned entity. It has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Introduction

Respondent Ideal Steel Supply ("Ideal") sues Petitioners, National Steel Supply ("National") and its owners, Joseph Anza and Vincent Anza ("Anzas"), alleging violations of § 1962(a) and (c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, and breach of contract. JA 5-10. Under a "cash, no tax" scheme, National and the Anzas intentionally failed to collect and remit New York State sales taxes on cash sales and filed fraudulent sales tax returns with the intent and effect of causing Ideal, National's principal competitor, to lose business, because National is able to charge less than Ideal on cash sales. JA 6-7, 8-9, 10, 11-12, 13, 15-16. This scheme also breaches a settlement agreement the parties executed to resolve a 1997 litigation, wherein National and Ideal agreed not to interfere with each other's "business activities 'other than through legitimate and proper competition.'" JA 7, 18-19; *see also* JA 25 n.3.

The district court dismissed the Amended Complaint because Ideal did not allege that it "relied on the [fraudulent] sales tax returns [the Anzas and National] mailed or wired to the New York State Department of Taxation and Finance." JA 28. The court declined supplemental jurisdiction over Ideal's breach of contract claim and entered judgment in favor of the Anzas and National. JA 2, 30. The Second Circuit reversed and vacated the judgment dismissing Ideal's RICO and breach of contract claims. JA 57. The court below analyzed (a) Ideal's factual allegations, JA 33-36; (b) RICO's statutory language, JA 38-40; (c) *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and Second Circuit decisions applying RICO's proximate causation requirement, JA 40-46; (d) *Sedima, S.P.R.L. v.*

Imrex Co., 473 U.S. 479 (1985), which recognized Ideal's standing to sue; and (e) other cases upholding the right of competitors to sue, even if defendants' misrepresentations were relied on by a third party rather than by the plaintiff. JA 46-53. The Second Circuit applied applicable pleading, standing and proximate causation precedents to the allegations, concluding that "Ideal, as a competitor directly targeted by [the Anzas and National] for competitive injury, has standing to assert its RICO claims . . . for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud." JA 54.

The Second Circuit rejected Petitioners' hypothetical assertion that supposed "problems of proof inherent in Ideal's theory of causation are intractable." JA 55. "The evidentiary difficulty hypothesized by [the Anzas and National] . . . **is not a proper basis for dismissal pursuant to Rule 12(b)(6) for failure to state a claim**." *Id.* (emphasis added; citations omitted). The proper focus is the sufficiency of Ideal's allegations, not Petitioners' hypothetical defenses. This point is critical because Petitioners offer an incomplete statement of the facts alleged by Ideal, Pet. Br. at 5-6, and ignore the applicable standard of review. So, too, does their *amicus curiae*. Brief of Chamber of Commerce of U.S. at 2-3, 22-23 & n.9. Ideal's claims "must be sustained if relief could be granted 'under any set of facts that could be proved consistent with the allegations.'" *National Organization for Women v. Scheidler*, 510 U.S. 249, 256 (1994) (citation omitted). This Court must take Ideal's factual allegations as true and construe them in the light most favorable to Ideal. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

B. Respondent's Factual Allegations

1. Ideal And National Are Head-To-Head Competitors

Ideal and National are the only vendors in the Bronx and Queens offering a comprehensive mix of steel mill products and related hardware, supplies and services to ornamental ironworkers and small steel fabricators.[1] Products and services offered by Ideal and by National are virtually the same and they offer them in a "lumberyard" setting, conducting much of their business on a "cash and carry" basis with no minimum order required, providing convenient, one-stop shopping for the professional ironworkers, small steel fabricators and "do-it-yourself" homeowners. JA 8-9. Ideal and National purchase the steel and other products they sell from manufacturers outside New York State and sell those products for use in the New York, New Jersey and Connecticut area. JA 9.

Ideal and National have each been vendors of steel mill products and related supplies and services at their respective locations in Queens for more than ten years. National is located less than a four-minute drive from Ideal's Queens location. Since November 1996, Ideal has also maintained a location in the Bronx. In the Summer of 2000, National opened a Bronx location just eight minutes by automobile from Ideal's location. There are no other vendors in Queens or the Bronx that carry the same or

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[1] Petitioners pretend this case is nothing more than a family "feud." Pet. Br. at 1, 7. While Respondent disputes the accuracy or relevance of that characterization, it is true that Ideal is owned by Giacomo ("Jack") Brancato, Petitioner Joseph Anza is Mr. Brancato's uncle by marriage, and Petitioner Vincent Anza is Mr. Brancato's cousin. *Ideal Steel Supply Corp. v. Anza*, Case No. 02 Civ. 1788 (RMB), Plaintiff's Response to Defendants' Rule 56.1 Statement, at 2 (S.D.N.Y. Oct. 24, 2005), Docket No. 84.

similar comprehensive array of products and services serving the same customers. JA 9-10.

Ideal and National compete on the basis of **price**. Their products are commodities that are not sold on the basis of brand or manufacturer. From their customers' perspective, the only significant difference in goods and services purchased from Ideal or National is the **total price** the customer has to pay. While differences in prices charged by Ideal and National affect customers' decisions to purchase from one or the other, the overall demand for the products is not significantly affected by changes in prices. Total demand in the market depends upon economic activity in the real estate and construction businesses and demand for ornamental security or other ironworks products. Neither Ideal nor National can substantially increase overall demand for their products and services by reducing prices or through marketing efforts. Increases in sales by Ideal or by National that do not result from changes in overall market demand come at the expense of the other's sales. JA 10.

2. Requirements Of New York State Tax Law

Under New York State Tax Law (the "Tax Law"), sales to end users by Ideal and National are subject to state and local sales tax – at the relevant time 8.25% of the selling price (now 8.375%) – except that sales to purchasers with valid resale certificates are exempt. All sales are presumed taxable unless a valid resale or exempt certificate is furnished by the purchaser within 90 days of purchase. JA 9-11. National and Ideal are obligated to advise each customer of the amount of tax due on a sale and to charge, collect and pay to New York State the applicable sales tax on all taxable sales. Every sales slip, invoice, or receipt

given to a customer must separately state the amount of sales tax charged on that particular sale, and National and Ideal must report, on a monthly or quarterly basis, the amount of sales receipts for taxable sales and the amount of state and local sales tax due thereon. Ideal and National are obligated to pay the State the requisite sales tax collected for the previous reporting period when they file their returns. JA 11.[2]

3. The Anzas' Racketeering Scheme

As National's sole owners, the Anzas direct and control activities in connection with its state-mandated obligations of charging and collecting sales tax, making sales tax payments to the State and filing sales tax returns. In willful violation of the Tax Law, the Anzas operated a "cash, no tax" scheme. When National's customers pay in cash, its employees do not charge or collect the required sales tax. National provides to the customer a receipt on which only a single price per item is given and no sales tax is indicated. National does not report or pay to

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[2] *See* N Y TAX LAW §§ 1101, 1105 and 1131-1137; 101 N.Y. JUR 2D, *Taxation and Assessment* § 1791 (2005) (vendors required to collect sales tax from customer when collecting price), § 1800 (presumption that all sales are subject to sales tax until contrary is established), § 1803 (sales tax must be shown and charged separately on any sales slip, invoice, receipt, or statement given to customer by person required to collect tax), § 1804 ("A person required to collect the sales and use tax is prohibited from advertising or holding out to the purchaser or the public in any manner, directly or indirectly, that the tax is not considered an element of the price. . . Nor may he indicate that the customer is not being charged the tax, or that the tax will be refunded to the customer or applied as a credit to the customer's bill, account, of future purchases.") (citations omitted).

the State sales tax on those taxable sales for which National did not charge tax to its customers. JA 11-12.

The Anzas furthered their "cash, no tax" scheme by filing on behalf of National, on a monthly or quarterly basis for each reporting period starting in 1998 (if not earlier), state sales tax returns they knew to be false. National's returns misrepresented the total amount of taxable sales and the amount of sales tax collected for the quarter (or month). JA 12. Based on fraudulent misrepresentations (and omissions) in the sales tax returns, upon which the Department of Taxation relied, National avoided paying sales tax on a significant portion of its taxable sales. The false returns, and the State's reliance thereon, were essential for the Anzas and National to avoid paying sales tax and continue their racketeering scheme over an extended period of time. JA 12-13.

4. Petitioners' Illegitimate Competitive Advantage And Injuries To Ideal's Business Or Property

The purpose and direct effect of the "cash, no tax" scheme is to create an illegitimate competitive advantage for National. By failing to charge and collect sales tax and failing to remit sales tax to the State, which can only be accomplished by filing false returns, National is able to reduce the total amount its cash customers pay by at least 8.25% without reducing its own profit margin. Ideal's prices are the same or lower on average than National's prices; however, because National does not charge sales tax on taxable sales, the overall cost to customers is typically lower than at Ideal for the same goods and services. But for the "cash, no tax" scheme, National would

not have a competitively significant price advantage over Ideal. JA 13, 15.

The racketeering scheme has had a significant and intended deleterious effect on Ideal's business. For example, Ideal experienced a steep drop in taxable cash sales after National opened its Bronx facility that was disproportionate to the effect that National's new Bronx location had on Ideal's overall sales, including non-cash taxable sales and tax-free sales made to purchasers with a valid resale or tax-exempt certificate. Legitimate business competition cannot explain the disproportionate decline in Ideal's taxable cash sales in comparison with Ideal's other sales for which National cannot offer unlawful savings under the "cash, no tax" scheme. JA 13-14.

The "cash, no tax" scheme directly injures Ideal because the unlawful tax saving is intended to and does attract customers to make purchases from National which would otherwise have been made from Ideal. The scheme directly injures Ideal because it is aimed at increasing National's market share and overall profits at the expense of its principal competitor. Petitioners profit from their racketeering scheme only by gaining business at Ideal's expense. JA 16. As a direct result of the racketeering scheme and National's false tax returns, Ideal lost a substantial volume of its taxable cash business and lost profits exceeding $5 million. JA 16-17, 19-20. Ideal alleged facts sufficient to show that the injury to "business or property" was proximately caused by Petitioners' operation of National's stores through a "pattern of racketeering activity." JA 33-36, 53-54.[3]

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[3] Ideal's allegations are far more detailed than those found deficient in *Dura Pharmaceuticals, Inc. v. Broudo*, ___ U.S ___, 125

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C. Ideal's RICO Claims

Ideal's First Cause of Action alleges that the Anzas violated § 1962(c), and the Second Cause of Action alleges that the Anzas and National violated § 1962(a). JA 14-18. The Second Circuit held that each element of Ideal's RICO claims was properly stated. JA 38-40, 54-55. For purposes of Ideal's § 1962(c) claim, the Anzas are the liable "person[s]" and, for the § 1962(a) claim, National is also a "person." For purposes of the § 1962(c) claim, National is the "enterprise" and the Anzas "direct[] and control" National's affairs, thereby satisfying the "operation or management" test, *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993), and the distinction between liable "person[s]" and "enterprise." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). Ideal's § 1962(a) claim alleges that the "enterprise" is National's Bronx location, which was opened by the Anzas in Summer 2000 with the racketeering income derived from their "cash, no tax" scheme. The "pattern of racketeering activity" – mail fraud and wire fraud – is the filing of National's false sales tax returns on a quarterly or monthly basis. JA 15-16, 39-40.[4]

S Ct. 1627, 1630, 1632, 1634 (2005). Petitioners have never complained that Ideal did not "provide . . . some indication of the loss and the causal connection that [Ideal] has in mind." *Id.* at 1634.

[4] "The mailing of false state sales tax returns may constitute mail fraud in violation of § 1341." JA 39 (citing *United States v. Porcelli*, 865 F.2d 1352, 1360-61 (2nd Cir.), *cert. denied*, 493 U.S. 810 (1989), and *United States v. Slevin*, 106 F.3d 1086, 1088 (2nd Cir. 1996) ("Because the [mail and wire fraud] statutes use the same relevant language, they are analyzed in the same way")).

D. Subsequent Proceedings In The District Court

Following the Second Circuit's decision, Petitioners filed an Answer to Ideal's Amended Complaint. Fact discovery included the exchange of documents and the depositions of Ideal's management, the Anzas and others. According to Vincent Anza (National's owner and president), National did not charge or collect sales tax from any of its "cash customers" from its inception until the beginning of 2004. These "cash customers" included both "pick-up" and "delivery" sales, but if the same purchases were made from National with a check or on credit, New York State sales tax was added.[5] While the Anzas invoked the Fifth Amendment rather than answer questions about their income tax returns, they admitted skimming cash generated by sales that had not been reported on National's tax returns. During discovery, Petitioners amended their tax returns for 1998-2003 to increase by millions of dollars the reported income and "correct" other misstatements in the original returns, thereby confirming their income tax avoidance scheme.[6]

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[5] Vincent Anza testified that National started charging tax to its customers in the "beginning" of 2004. Joseph Anza testified that in Spring 2004, National started to separately report New York State tax on cash transactions. Depo. of V. Anza, at 93-94 (Jan. 11, 2005), Depo. of J. Anza, at 170-71 (Feb. 8, 2005).

[6] Depo. of V. Anza, at 467-76, Depo. of J. Ofsink, at 14-16, 40, 42 (excerpts attached as Exs. 1 and 2 to Plaintiff's Response to Defendants' Rule 56.1 Statement, *Ideal Steel Supply Corp. v. Anza*, Case No. 02 Civ. 4788 (RMB) (S.D.N.Y. Oct. 24, 2005), Docket No. 84. Ideal's forensic accountant demonstrated that Petitioners' amended tax returns are still false and misleading and significantly understate National's actual cash sales by millions of dollars. Report of Weiser LLP, at 36-41 (Mar. 11, 2005).

On December 30, 2004, Ideal filed its Second Amended Complaint ("SAC"). The Fourth and Fifth Causes of Action assert violations of § 1962(a) and (c), alleging that the Anzas and National engaged in an "income tax free sales" scheme to gain further competitive advantage over Ideal "by [knowingly] filing false income tax returns and defrauding the [IRS] and the New York State Department of Taxation of Finance," with each filing constituting a RICO predicate act. SAC ¶¶ 50-51, 90, 92. Since 1998, National "significantly understate[d] its income on its federal and state income tax returns by, *inter alia*, using the false sales tax figures taken from National's sales tax returns and understating its gross profit margins on its underreported sales by improperly manipulating the other components of the gross profit calculation. . . . " SAC ¶¶ 7, 48. The Anzas and National "pass on to National's customers the income tax 'savings' that [the Anzas and National] realize as a result of their false returns, thereby increasing National's sales and customer base through lower pricing without decreasing its profit margin," and causing injury to Ideal's business. SAC ¶¶ 56-57, 95. The Second Amended Complaint was deemed filed as of April 20, 2005. *Ideal Steel Supply Corp. v. Anza*, 2005 WL 911470, *1 (S.D.N.Y. Apr. 19, 2005). This case is now ready for trial as to Ideal's RICO and breach of contract claims.

SUMMARY OF ARGUMENT

For the sixteenth time in a generation, this Court is called upon to construe RICO's civil remedy provision.[7]

[7] Reference to this Court's previous civil RICO decisions demonstrates the statute's intended breadth and correct methods of interpreting its

(Continued on following page)

Petitioners inappropriately ask this Court to restrict § 1964(c), which grants Ideal standing to sue: "**Any person injured in his business** or property **by reason of** a violation of [§] 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . ." 18 U.S.C. § 1964(c).[8]

By ignoring the first clause and focusing exclusively on the second clause, which imposes a "proximate cause" requirement, the Anzas and National miss the point of this case. Pet. Br. at 10-11. Ideal and National are **direct competitors** and Ideal was the "target" and "victim" of the Anzas' scheme and pattern of racketeering activity. JA 33-34, 46-54. Who else but a head-to-head **competitor** that lost sales and profits due to the "cash, no tax" scheme has been injured in its **business** and, therefore, has standing to sue? JA 54 ("[W]e conclude that Ideal, as a

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provisions. *See, e.g., Scheidler v. National Org. for Women, Inc.*, No. 04-1244 (anti-abortion protests); *Pacificare Health Sys. v. Book*, 538 U.S. 401 (2003) (managed care); *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393 (2003); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (boxing); *Beck v. Prupis*, 529 U.S. 494 (2000) (employment termination); *Rotella v. Wood*, 528 U.S. 549 (2000) (wrongful imprisonment); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (products liability); *National Org. for Women v. Scheidler*, 510 U.S. 249 (1994) ("*NOW I*"); *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (securities fraud); *Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258 (1992) (securities fraud); *Tafflin v. Levitt*, 493 U.S. 455 (1990) (securities fraud); *H.J., Inc. v. Northwestern Bell Tele. Co.*, 492 U.S. 229 (1989) (bribery); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (anti-competitive behavior); *American Nat'l Bank & Trust Co. of Chicago v. Haroco, Inc.*, 473 U.S. 606 (1985) (prime rate fraud); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (breach of contract).

[8] Here, as elsewhere in Respondent's Brief, emphasis is added unless otherwise indicated.

competitor directly targeted by [the Anzas] for competitive injury, has standing to assert its RICO claims").

In addition to ignoring the statutory language, Petitioners avoid RICO's express purpose and legislative history, which also support Ideal's standing to sue. On at least three occasions, *see Sedima*, 473 U.S. at 497 & n.15; *Holmes*, 503 U.S. at 273 n.19; and *NOW I*, 510 U.S. at 255-56, this Court has recognized Ideal's standing. Petitioners also ignore circuit court decisions recognizing the standing of **competitors** to bring RICO claims where "racketeering activity" consists of mail and wire fraud directed from defendants to third parties, including customers and government agencies. Petitioners also ignore commentators' analysis of RICO standing (injury plus causation) that is consistent with the decision of the court below and arguments advanced here by Ideal.[9]

Ideal was the intended target and victim of Petitioners' racketeering scheme. Injuries to its "business or property" are not indirect or derivative, and they do not flow from injuries inflicted upon third parties. While others (such as the State of New York) may have also been "directly" injured by Petitioners' false tax filings, there is

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[9] *See, e.g.*, Randy D. Gordon, *Rethinking Civil RICO: The Vexing Problem of Causation in Fraud-Based Claims Under 18 U.S.C. §1962(c)*, 39 U.S.F. L. REV. 319 (2005); Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 WASH. & LEE L. REV. 83 (2002); Ryan C. Morris, *Proximate Cause and Civil RICO Standing*, 2004 BYU L. REV. 739, 739 n.2 (2004) (citing earlier articles); Stephen Scallan, *Proximate Cause Under RICO*, 20 S. ILL. U. L.J. 455 (1996); and G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young. Its Meaning and Impact on Substantive, Accessory, Aiding & Abetting and Conspiracy Liability Under RICO*, 33 AMER. CRIM. L. REV. 1345 (1996) ("Blakey & Roddy, *Reflections*").

no suggestion in § 1964(c) or *Holmes* that there can be only one "directly" injured party. Unlike *Holmes*, where the injury to the target(s) of the racketeering scheme was not the cause of the injury that SIPC sustained, thereby making SIPC's claim indirect or derivative, here the injury to Ideal (lost profits) was directly caused by the price advantage that Petitioners' RICO violations unlawfully created.[10] Ideal's lost sales and profits were not caused by or derived from New York State's diminished sales tax collections. Ideal does not seek to collect taxes owed by National to the State; indeed, the injury to Ideal's business or property is independent of the State's financial losses.

Ideal's "reliance" allegations are well within the requirements of § 1964(c) and the common law. Ideal does not allege that it relied on Petitioners' false fax filings; rather, the State of New York relied and its reliance was an essential and necessary element for the racketeering scheme to succeed. In order to offer cash customers (a majority of National's business) the overall lower prices that not charging or collecting sales tax allowed, and benefit from the increased business taken from the customer such illegal pricing generated, Petitioners had to

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[10] The competitive advantage gained by National through the "cash, no tax" scheme was recognized in *Porcelli*, 865 F.2d at 1359-62, which affirmed the RICO and mail fraud conviction of a gas station operator who filed "some one hundred" fraudulent New York State sales tax returns with respect to sales at 12 gasoline stations he operated. Rejecting the argument that the mail fraud statute does not apply to tax violations, the Second Circuit found that Porcelli "intended to deprive New York of its property"; namely, the unpaid sales taxes. *Id* at 1359-62. "Porcelli, as he knew he was doing, obtained cash, and this is true whether or not he actually collected the sales tax on his gasoline sales **If he did not collect the tax, then he obtained funds that an honest retailer, selling for the same price, would have remitted to the state.**" *Id* at 1360 (emphasis added).

understate their sales and corresponding sales tax obligations. The State of New York's reliance on those monthly or quarterly filings, so as not to question Petitioners or require them to prove their accuracy, was necessary to allow the racketeering scheme to proceed, thereby causing injury to Ideal's business, unimpeded by regulatory interference, for years and years.

In their depositions, the Anzas admitted that National **never** charged sales tax to cash-paying customers – and always understated its sales and sales tax obligations in tax filings until April 2004. In that month (two years after this case began), the Department of Taxation commenced a sales tax audit of National's business. Ideal's taxable cash sales, which had plummeted when the Anzas opened a competitive facility near Ideal's Bronx location in 2000, improved dramatically once National ended its "cash, no tax" practices. Whether those two events were mere coincidence (as Petitioners claim), or evidence the racketeering scheme and the role of the State of New York's reliance upon the false tax filings made as a necessary part of that scheme, is for a jury to decide.

Petitioners seek to reduce Ideal's RICO claims to nothing more than a "garden variety" business dispute and common law fraud claim.[11] While elements of a RICO claim may be partly infused with common law learning, the two claims – RICO and common law fraud – are not identical. But even if common law governs this case (and it does not), Petitioners' crabbed view of reliance is wrong.

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[11] One fervently hopes, for the sake of our society and the rule of law, that Petitioners' multiyear "cash, no tax" scheme, which allegedly deprived the State of New York of millions of dollars in tax revenue, and cost Ideal millions of dollars in lost sales and profits, does not represent "common" and "routine" business behavior. Pet. Br. at 2, 12.

Since at least 1876, third-party reliance (such as New York State's reliance upon the false tax filings) has been sufficient for common law fraud where the third party's action (or inaction) in reliance on the misrepresentations is essential for the scheme to succeed.

Nothing in RICO militates against allowing third-party reliance in this case. Schemes to defraud come in all shapes and sizes, limited only by the imagination of the malevolent, and the mail and wire fraud statutes are broad enough to encompass all such schemes. Section 1964(c)'s requirement of alleging injury to Ideal "business" or property "by reason of" Petitioners' racketeering scheme is inclusive. Nothing in the statute, or this Court's construction of RICO injury and proximate causation in *Sedima, Holmes,* or *NOW I*, precludes allegations of third-party reliance if a scheme to defraud directly causing injury necessarily includes persuading a third party to act or not to act in a particular way to allow wrongdoers to achieve their intended and illegal goals.

ARGUMENT

A. The Second Circuit's Decision Is Consistent With RICO's Statutory Language, Express Purpose And Legislative History

To remain faithful to this Court's precedents (*see* note 7, *supra*), any reasoned analysis must consider RICO's language, legislative history, and public policy. To establish standing to sue, § 1964(c) requires Ideal to allege two elements: That it suffered injury to "business or property" and that its injury was caused by predicate acts of racketeering activity that make up the violation of § 1962. *Sedima*, 473 U.S. at 496-97; *Mid Atlantic Telecom, Inc. v. Long Distance*

Servs., Inc., 18 F.3d 260, 263 (4th Cir.), *cert. denied*, 513 U.S. 931 (1994). By providing a cause of action to "**any** person injured" by reason of the law's violation, RICO avoids undue limitations on the plaintiffs eligible to sue.

Ironically for this case, which involves head-to-head competitors, one of the earliest injury limitations that lower courts sought to impose on § 1964(c) was "competitive injury."[12] Although the Second Circuit rejected the "competitive injury" requirement, it adopted an equally amorphous "racketeering injury" requirement. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 496 (2nd Cir. 1984). This Court reversed, stating that "we perceive no distinct 'racketeering injury' requirement. . . . If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)." *Sedima*, 473 U.S. at 496. "**[T]he statute requires no more than this.**" *Id.* at 497 (emphasis added). *Sedima* foreclosed attempts to limit RICO's scope by granting standing only to plaintiffs alleging a "competitive injury" or a "racketeering injury" distinct from harm caused by predicate acts. *Id.*; *see also Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 387-99 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985).

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[12] "Competitive injury" referred to injury derived from the impact on the marketplace of the RICO violation. The case for "competitive injury" was founded on RICO's antitrust origins. Congress's concern, it was argued, was that the commercial marketplace "was being harmed because legitimate businesses were forced to compete with racketeer-dominated businesses that could operate more efficiently because they made use of unlawful practices." This being the case, "it followed that the scope of RICO's private action should be limited to those types of situations." 2 Arthur F. Mathews *et al.*, CIVIL RICO LITIGATION § 8.03[A], at 8-17 (2nd ed. 1992) ("Mathews, CIVIL RICO LITIGATION").

Affording broad standing to RICO plaintiffs is "consistent with the statute's purpose. It was passed in order to address what was found to be a pervasive and serious problem in our society, namely, the proliferation of racketeering within the legitimate business sector." *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 568 (E.D.N.Y. 1999). Criminal penalties for violations of RICO are stiff, yet criminal prosecutions alone are inadequate to deal with racketeering. The Government is not in a position to identify all significant transgressions. Treble damages enhance the likelihood that private parties will be induced to assume the role of "private attorneys general," vindicating not only their own interests but those of society as well. *Agency Holding Corp.*, 483 U.S. at 151. As this litigation demonstrates, Ideal is best equipped to serve as "private attorney general" and effectively prosecute Petitioners' "cash, no tax" scheme.

Ideal alleges that "[a]s a direct result of [Petitioners'] racketeering scheme and National's false state tax returns," it has "lost a substantial volume of its taxable cash business which has cost and continues to cost Ideal a substantial amount of profits and market share." JA 16. "Such economic losses would constitute an injury to both [Ideal's] business and property." *Blue Cross*, 36 F. Supp. 2d at 569; *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("When a commercial enterprise suffers a loss of money it suffers an injury in both its 'business' and its 'property.'"); *Mid Atlantic Telecom*, 18 F.3d at 261 (RICO standing based on alleged losses of revenue and customers). Other RICO decisions reach the same conclusion.[13]

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[13] *See Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325-30 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993) (developer lost project to competitor

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Ideal satisfies the pleading standard for RICO standing reiterated in *NOW I*, 510 U.S. at 256. The plaintiffs – DWHO and SWHO – were health care centers that perform abortions and they alleged that anti-abortion protesters conspired to use threatened or actual force, violence, or fear to induce clinic employees, doctors and patients to give up their jobs, their right to practice medicine, and their right to obtain medical services at the clinics. *Id.* at 252-53. DWHO and SWHO claimed that the conspiracy "has injured the[ir] business and/or property interests." *Id.* at 253-54. Upholding the clinics' "standing to bring their claim," *id.* at 255, this Court, per Chief Judge Rehnquist, stated that the complaint "alleges [an] 'injury' to DWHO and SWHO 'fairly traceable to the [protesters'] allegedly wrongful conduct.' **Nothing more is needed to confer standing on DWHO and SWHO at the pleading stage.**" 510 U.S. at 256 (citations omitted). *NOW I* found that the clinics properly alleged RICO standing, even though the intimidating acts were largely directed against third parties (patients, employees and physicians), thereby allowing the clinics to claim damage to their "business or property" resulting from acts directed

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because of bribes paid to local officials); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1067 (3rd Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990) (competitor bribed Nigerian government during bid process); *In re American Honda Motor Co. Dealerships Relations Litig.*, 941 F. Supp. 528, 540-43 (D. Md. 1996) (automobile dealers deprived of profits when bribe-paying dealers unjustly received extra allotments of vehicles); *Mylan Labs., Inc. v. Akso, N.V.*, 770 F Supp. 1053, 1084 (D Md. 1991), *aff'd sub nom., Mylan Labs., Inc. v Matkari*, 7 F 3d 1130 (4th Cir. 1993) (alleged losses of revenue and customers). In "two-competitor cases," "**misappropriation by one party [National] can be reasonably equated to injury to the other [Ideal].**" *American Honda*, 941 F Supp at 542 (emphasis added). Ideal alleges that the relevant market is a zero-sum game *Compare* JA 8-14 *with* Pet Br at 17-18

at others. The decision in *NOW I* should control here. *See Mendoza v. Zirkle Apple Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002); *American Honda*, 941 F. Supp. at 542-43.

Section 1964(c), as construed in *Sedima* and *NOW I*, makes clear Ideal's standing to sue, and this conclusion is reinforced when we consider RICO's legislative history and public policy. RICO was enacted as Title IX of the Organized Crime Control Act of 1970 ("OCCA"), Pub. L. 91-452, 84 Stat. 941 (1970), because 18th and 19th Century jurisprudence was ineffective to combat white-collar crime.[14] Its Statement of Findings emphasized that "organized crime . . . is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption," that such activities "weaken the stability of the Nation's economic system, **harm innocent investors and competing organizations, interfere with free competition**, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens," and that organized crime "continues to grow" because "the sanctions and remedies available to the Government are necessarily limited in scope and impact." It was RICO's declared purpose "to seek the eradication of organized crime" by "providing **enhanced sanctions and new remedies** to deal with" its unlawful activities. 84 Stat. at 922-23

[14] OCCA was based upon recommendations of the President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), which observed that "organized crime is . . . extensively and deeply involved in legitimate business. . . . Here it employs illegitimate methods – . . . [including] **tax evasion** . . . to exact illegal profits from the public." *Id.* at 187.

(emphasis added).[15] Treble damages protect "**the honest businessman who has been damaged by unfair competition from the racketeer businessman.**" 115 Cong. Rec. 6993 (1969) (statement of Sen. Hruska).[16] *See NOW I*, 510 U.S. at 260 (protesters' acts of extortion "may drain money from the economy by harming businesses such as the clinics," which lost patients).

Just as RICO's legislative history forewarned, Petitioners' racketeering scheme has "drained [m]illions from the American economy." 84 Stat. at 922. Ideal's Amended Complaint describes the far-reaching, economic dislocation that RICO was intended to combat, and Ideal represents

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[15] RICO "was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, 464 U.S. 16, 26 (1983). Although its major purpose was "to address the infiltration of legitimate business by organized crime," RICO was not limited to the prohibition of infiltration of legitimate organizations. *United States v. Turkette*, 452 U.S. 576, 590, 591 (1981). Nor does it apply only to "organized crime" in the classic "mobster" sense. *Sedima*, 473 U.S. at 495. With its purposefully broad definition of "racketeering activity," RICO acknowledges the "breakdown of the traditional conception of organized crime, and responds to a new situation in which persons engaged in long-term criminal activity often operate wholly within legitimate enterprises." *H.J.*, 492 U.S. at 248. The statute is "broad[] enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *Id.* at 248-49.

[16] Referring to the Criminal Activities Profits Act, which contained the legislative antecedent to § 1964(c), Senator Hruska stated that the bill "**creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman.**" 115 Cong. Rec. 6993 (1969). Economists recognize that absent a treble damages remedy, fraud victims often cannot recover their **actual** losses. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 158-72 (1993) (after appropriate adjustment factors such as attorneys fees and lack of prejudgment interest, treble damages awarded are probably only equal to actual damages in antitrust cases).

the kind of business Congress intended to protect from racketeering and "white-collar" crime. RICO's legislative history, "not only refers frequently to the importance of undermining organized crime's influence upon legitimate businesses but also refers to the need to protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.'" *Cedric Kushner*, 533 U.S. at 165 (quoting S. Rep. No. 91-617, at 82).

Any doubts concerning application of the statute should be resolved in favor of vigorous enforcement of RICO's remedies. Section 904(a) of OCCA provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." 84 Stat. at 947. *Sedima* rejected attempts to narrow the reach of § 1964(c) because "RICO is to be read broadly. . . . This is the lesson not only of Congress' self-consciously expansive language and overall approach but also of its express admonition. . . ." 473 U.S. at 497-98 (citation omitted).

B. The Second Circuit's Decision Is Consistent With *Holmes*

1. The Decision In *Holmes*

Section 1964(c)'s "by reason of" clause limits standing to plaintiffs alleging that the violation was the legal (proximate) cause of their injury, as well as a logical ("but for") cause. *Holmes*, 503 U.S. at 268. The requirement that defendant's actions be a proximate cause of plaintiff's harm represents a policy choice premised on recognition of the impracticality of asserting liability based on the almost infinite expanse of actions that are in some sense causally related to an injury. In marking that boundary, this Court states that a plaintiff cannot complain of harm so remotely caused by a defendant's actions that imposing

legal liability would transgress our "ideas of what justice demands, or of what is administratively possible and convenient." *Holmes*, 503 U.S. at 268 (internal quotation marks omitted) (quoting W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984) ("Keeton, LAW OF TORTS").

Petitioners contend that the chain of causation between their refusal to collect and pay New York State sales taxes and Ideal's loss of customers, sales and profits is too long and tenuous to meet RICO's proximate cause test. Pet. Br. at 15-18. But *Holmes* entirely supports Ideal's right to sue Petitioners for injuries to its business or property. The defendants in *Holmes* were alleged to have participated in a conspiracy to manipulate the value of the stock of several companies. 503 U.S. at 262. Two broker-dealers who dealt in large amounts of the manipulated stock were put into liquidation when they experienced financial difficulties after the fraud was disclosed and the value of the manipulated stock precipitously declined. Alleging that defendants' securities fraud and mail and wire fraud offenses amounted to a pattern of racketeering activity, SIPC brought suit on behalf of certain of the injured broker-dealer firms' customers who became unsecured creditors when the firms became insolvent. *Id.* at 270.

Justice Souter's majority opinion applied a proximate cause test requiring a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268. The "direct relation" requirement generally precludes recovery by a "plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* This Court found that the link between the customers' losses that SIPC sought to recover and defendants' stock manipulation was too remote to

satisfy this "direct relation" test. "The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the . . . customers." *Id.* at 271. This Court noted in contrast that the liquidating trustees suing directly on behalf of the defunct broker-dealers would have been the proper plaintiffs. *Id.* at 273. The same thing is true in this case: Ideal is the proper plaintiff to sue Petitioners, and *Holmes* would only defeat its RICO claims if the plaintiff was one of Ideal's **creditors** (banks, vendors, employees, etc.) that Ideal could not pay because it had been economically injured by Petitioners' racketeering scheme.

Holmes stressed the difficulty of achieving precision in fashioning a test for determining whether a plaintiff's injury was sufficiently "direct" to permit standing under RICO. *Id.* at 272 n.20 ("[T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case."). This Court warned against applying a mechanical test detached from policy considerations associated with the proximate cause analysis. Accordingly, the federal courts, and the Second Circuit in particular, have turned to those policy considerations to guide application of the "direct relation" test. *See, e.g., Commercial Cleaning Svcs., L.L.C. v. Colin Svc. Sys., Inc.*, 271 F.3d 374, 380-85 (2nd Cir. 2001).

2. Evaluation Of Ideal's Claims Against Petitioners In Relation To This Court's Proximate Causation Test

Ideal alleges a "direct" proximate relationship between the injury to its "business or property" and Petitioners' pattern of racketeering activity. JA 40-54. *Holmes* gave three policy reasons for limiting RICO's civil damages

action only to those plaintiffs who could allege a "direct" injury. **First**, the less "direct" an injury is, the more difficult it becomes to determine what portion of the damages are attributable to the RICO violation as distinct from other, independent factors. *Holmes*, 503 U.S. at 269, 273. **Second**, if recovery by indirectly injured plaintiffs were not barred, the courts would be forced, in order to prevent multiple recovery, to develop complicated rules apportioning damages among groups of plaintiffs depending on how far each group was removed from the defendant's underlying RICO violation. *Id.* **Third**, there was no need to permit indirectly injured plaintiffs to sue because directly injured victims could be counted on to vindicate RICO's aims, and their recovery would fix the injury to those harmed as the result of the injury they suffered. *Id.* at 269-70, 273-74; *see also Commercial Cleaning*, 271 F.2d at 381-85.

a. The Simplicity Of Determining Damages Attributable To Petitioners' RICO Violations

Petitioners argue that a factfinder would be required to determine whether Ideal's lost business to National was the result of the "cash, no tax" scheme as opposed to independent business reasons, such as the comparative quality of the companies' services and business reputations, fluctuations in demand, or other reasons customers might have for selecting one company over another. Pet. Br. at 15-17. The difficulty of proof identified in *Holmes* 503 U.S. at 269, 273, however, was quite different from this case. Ideal and National are head-to-head competitors. JA 6, 8-9, 33-34. Ideal lost customers, business and profits exceeding $5 million because National was able to

underbid Ideal due to its "cash, no tax" scheme, which permitted it to charge lower prices for its products in a market in which Ideal and National compete against one another "primarily on the basis of price." JA 10-14, 34-36. Ideal was no less directly injured than the insolvent broker-dealers in *Holmes*, whose trustees would be proper plaintiffs. *See Holmes*, 503 U.S. at 273-274.[17] If Ideal can prove its claims at trial (and discovery conducted during 2004-2005 and reports submitted by its experts show it can), a jury can find that Ideal lost sales and profits directly because of the price advantage Petitioners realized through their "cash, no tax" scheme.[18]

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[17] Petitioners speculate that a "potential causal explanation for Ideal's lost profits could be 'poor business practices,'" Pet. Br. at 18 (quoting *Holmes*, 503 U.S. at 273), or other business reasons, *id.* at 10-11, 16-18, but there are no such allegations in Ideal's Amended Complaint. As was made clear in *Zirkle*, 301 F.3d at 1171, relying on *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), an antitrust price-fixing case brought by milk producers against cheese producers who allegedly fixed the price of cheese which, in turn, set the price of milk artificially low, when addressing causation issues on a motion to dismiss, courts must necessarily reject defendants' speculative claim that the anti-competitive effect of their scheme was due to "independent factors" because "in deciding a Rule 12(b)(6) motion we are dealing only with the complaint's allegations." *Zirkle*, 301 F.3d at 1171 (quoting *Knevelbaard*, 232 F.3d at 991).

[18] A "proximate" cause is not the same thing as a "sole" cause, a factor is a proximate cause if it is "a substantial factor in the sequence of responsible causation." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) (citation omitted). Thus, Ideal "need[s] not prove" at trial that Petitioners' "cash, no tax" scheme and the false and misleading sales tax returns (mail and wire fraud) were the "sole" cause of injuries to its business or property, *id.*, rather, Ideal must only show that Petitioners' predicate acts were a "substantial factor" in perpetuating their racketeering scheme and causing Ideal's injury. *Maiz v. Virani*, 253 F.3d 641, 675 (11th Cir. 2001); *compare* Keeton, LAW OF TORTS, § 41 at 268 ("If a defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability

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b. There Is No Need To Apportion Damages Among Injured Parties

Holmes stated that if courts do not limit recovery to injuries directly related to the RICO violation, they will be forced to devise complicated rules "apportioning" damages among plaintiffs at different degrees of separation from the violative acts alleged. 503 U.S. at 269, 273. Petitioners contend Ideal is not the only aggrieved party that could recover damages. Pet. Br. at 18-19 & nn.3-4 (identifying other potential plaintiffs as New York State and "Ideal's suppliers"). But this misses the point made in *Holmes*: If damages are paid **both** to first-tier plaintiffs (those directly injured by defendant's alleged acts) **and** to second-tier plaintiffs (those injured by the injury to the first-tier plaintiffs), then the payment of damages to first-tier plaintiffs cures the harm to second-tier plaintiffs, and payment of damages to the latter involves double compensation. *Holmes*, 503 U.S. at 269, 273. If defendant's illegal acts causes "direct" injury to more than one category of plaintiffs, defendant may well be obligated to compensate different plaintiffs for different injuries, and it does not follow that any plaintiff will have been twice benefited. *Compare Commercial Cleaning*, 271 F.3d at 383-84 *with* Pet. Br. at 19-20.

Ideal does **not** seek to recover damages (unpaid sales taxes) that belong to the State of New York. Assume a $100 cash sale of 25 ½-inch square steel bars (a common commodity) to a small contractor in the Bronx. The honest retailer, Ideal, charges the customer $108.25 ($100 + $8.25 sales tax). The dishonest retailer, National, neither

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merely because other causes have contributed to the result, since such causes, innumerable, are always present") *with* Pet. Br at 17-18.

charges nor collects the 8.25% state sales tax and may even charge the customer up to $107, thereby undercutting Ideal's price, increasing its profit margin by several extra dollars, and depriving the State of New York of sales tax that was owed. New York State's injury is 8.25% of the sales price, the tax that National failed to collect and remit to the State, plus interest and penalties. Ideal, which lost the $100 sale, suffers a **different** injury, namely, its lost sale and the gross profits thereon. Assuming a 20% gross profit margin (as demonstrated in discovery and by Ideal's experts), the injury to Ideal's business or property is $20 from that $100 sale. The important point, for purposes of *Holmes* causation analysis, 503 U.S. at 273, is that there is no need to "apportion" damages between Ideal and New York State. They are not at "different levels of injury" from Petitioners' racketeering scheme. The amount of damages that they, as first-tier plaintiffs, are entitled to collect from Petitioners are independent, separate and distinct and there is no "risk of multiple recoveries" of the same damages. *Id.* at 269; *Mid Atlantic*, 18 F.3d at 264 (plaintiff did not seek to vindicate claims of customers who accepted defendant's fraudulent, ostensibly lower rates but, rather, alleged "distinct and independent injuries: lost customers and lost revenues").

Petitioners hypothesize a plethora of RICO claims, asserting that "Ideal's suppliers" (or, presumably, Ideal's other creditors and even its employees) could "seek treble damages and attorneys' fees from National." Pet. Br. at 18 n.3. But these "creditors" would still be required to show that their losses were proximately caused by the racketeering scheme. The concern of *Holmes* was that a violator might be obligated to pay double compensation if required to compensate those directly injured (Ideal) and those injured by the injury to those directly injured

(hypothetically, Ideal's "creditors"). 503 U.S. at 269, 273. It was not that a violator might be obligated to compensate two or more different classes of plaintiffs – Ideal and New York State – each of which suffered a separate, concrete financial injury proximately caused by Petitioners' RICO violations. *See Commercial Cleaning*, 271 F.3d at 384.

c. The Ability Of Other Parties To Vindicate The Aims Of The Statute

In relation to the third *Holmes* policy factor, this Court observes that "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in [RICO] enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Associated Gen'l Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (*cited in Holmes*, 503 U.S. at 270). Petitioners argue that this factor weighs against Ideal's standing because other parties, such as New York State, may bring suit or press criminal charges. Once again, Petitioners miss the point: If the existence of a public authority that could prosecute a claim against putative RICO defendants meant that the plaintiff is too remote under *Holmes*, then no private cause of action could ever be maintained because every RICO predicate offense, as well as the RICO enterprise itself, is separately prosecutable by the government. In *Holmes*, 503 U.S. at 269-70, 271 & n.18, those directly injured could be expected to sue, and their recovery would redound to the benefit of the plaintiffs suing for indirect injury.[19]

[19] *Holmes* observed that "the broker-dealers have in fact sued in this case, in the persons of their . . . trustees appointed on account of

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Here, in contrast, suits by New York governmental authorities to "recover lost taxes" would do nothing to remediate Ideal's loss of profits. *Compare Commercial Cleaning*, 271 F.3d at 385 *with* Pet. Br. at 19-20. There are no potential plaintiffs who have been more directly injured by the RICO violations than Ideal, National's only business competitor, which has a greater incentive to ensure that a RICO violation does not go undetected or unremedied. *See Holmes*, 503 U.S. at 273-74, *Commercial Cleaning*, 271 F.3d at 385.[20]

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their insolvency." 503 U.S. at 273 (footnote omitted). No other civil actions (let alone criminal prosecutions) have been brought against Petitioners arising out of the "cash, no tax" scheme. As in *Zirkle*, 301 F.3d at 1170, "[n]either the [New York State] government nor [Ideal's creditors or suppliers] are an intervening third party" in this RICO action.

[20] Petitioners also suggest that the Second Circuit should have dismissed Ideal's § 1962(a) claim. *Compare* JA 39, 54-55 *with* Pet. Br at 20 n.5. This issue is not before this Court, but it is clear that Ideal properly alleged that Petitioners violated § 1962(a) by using ("investing") the proceeds of their unlawful "cash, no tax" scheme from sales at their Queens location to open National's Bronx location, thereby causing Ideal additional (and distinct) injuries to its business or property. JA 17-18; 54-55; *see American Honda*, 941 F. Supp. at 549-50 (honest car dealers pled "investment use" injury when they alleged that corrupt Honda executives used bribes and kickbacks they received to obtain ownership interests in new or existing dealerships). Section 1962(a) "was primarily directed at halting the investment of racketeering proceeds into legitimate businesses, **including the practice of money laundering**." *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3rd Cir. 1991) (emphasis added). That is precisely what Ideal alleges.

C. The Second Circuit's Decision Is Consistent With Post-*Holmes* Decisions

1. Reliance Is Not An Element Of Mail Or Wire Fraud, And It Is Not An Element Of Section 1962 Or Section 1964(c)

The *Holmes* Court said nothing about "reliance," even though Petitioners claim it is an element of mail, wire and securities fraud, the predicate acts in that case. 503 U.S. at 263.[21] By imposing a mechanistic "reliance" requirement in all RICO cases alleging "fraud-based" predicate acts, Petitioners raise the wrong question.[22] The question is not whether "reliance" should be required but, rather, reliance by **whom**. Even if many courts have imposed (wrongly we say) a "reliance" requirement in RICO cases where the predicate acts are mail or wire fraud, they also recognize that reliance by a third party (customers, regulators *et al.*) suffices when plaintiff alleges that it was a "competitor" of the racketeering enterprise and/or a "target" of the scheme. *Cf. Holmes*, 503 U.S. at 272 n.19. In their rejection of "third-party reliance," Petitioners ignore these precedents, even though many of them were relied on by the Court below. *Compare* Pet. Br. at 31-34 *with* JA 47-51.

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[21] In *Holmes*, 503 U.S at 274 n.20, this Court qualified its use of the term "direct," stating that "[w]e do not necessarily use it in the same sense as courts before us have and intimate no opinion on results they reached." This Court refused to follow *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), which held that a RICO plaintiff alleging mail fraud "must have been a target of the scheme to defraud **and must have relied to his detriment on misrepresentations** made in furtherance of the scheme." *Id.* at 1499-1500.

[22] As Justice Frankfurter observed, "[i]n law . . the right answer usually depends on putting the right question." *Estate of Rogers v. Comm'r of Internal Revenue*, 320 U.S. 410, 413 (1943).

Neither § 1962 nor § 1964(c) mention "reliance" as a requirement for RICO liability or proof of damages. A common law fraud claim often (but not always) required proof that the defrauded plaintiff relied upon the misrepresentation, and some courts have incorrectly imported this requirement into RICO actions involving mail or wire fraud. *See Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 104 & n.3 (1st Cir. 2002) (collecting cases requiring "reliance" but rejecting argument that "reliance" is required element of RICO claim). RICO bases its own brand of civil liability on the commission of specified criminal acts (here, mail and wire fraud) so long as they comprise a "pattern of racketeering activity." Criminal fraud under these statutes does not require "reliance" by anyone: It is enough that defendant sought to deceive, whether or not he succeeded. *Neder v. United States*, 527 U.S. 1, 24 (1999) ("The common-law requirement[] of 'justifiable reliance' has no place in the federal fraud statutes."); *Schmuck v. United States*, 489 U.S. 705, 711-12 (1989) (mail fraud conviction upheld even though misrepresentations were not made to individual who suffered loss).

The mail fraud statute was drafted in a "sufficiently general" fashion to apply to a broad range of schemes. *United States v. Maze*, 414 U.S. 395, 399 n.4 (1974). Whether criminal fraud required "reliance" at common law varied with the particular form of fraud.[23] The statute is

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[23] *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., CRIMINAL LAW §§ 8.6-8.7 (2nd ed. 1986) (discussing requirements for various forms of common law criminal fraud). The crime of false pretenses may be considered the "classical" criminal fraud at common law, *see* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547 & n.161 (2001), and that crime contains a reliance requirement. *See Systems Mgmt.*, 303 F.3d at 104 n.4. *Durland v. United States*, 161 U.S. 306 (1896), held that the phrase "scheme to defraud" in

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frequently applied to complex third-party transactions that potentially inflict injury upon victims who do not "rely upon" the misrepresentations. *See* Goldsmith & Tilton, *Civil Racketeering Cases*, 59 WASH. & LEE L. REV. at 86-87 & nn.12-20 (collecting cases). Under a literal reading of §§ 1961, 1962 and 1964 of RICO, which is the presumptive choice in interpretation, nothing more than the criminal violation and resulting harm is required. As the First Circuit made clear in *Systems Mgmt.*, 303 F.3d at 104, "[t]here is no good reason here to depart from RICO's literal language by importing a reliance requirement into RICO."

2. *Ideal's* Reliance Upon Petitioners' Predicate Acts Is Not The Only Way To Allege Proximate Causation

Reliance is a specialized condition that happens to have grown up with common law fraud. While reliance by the victim is one way in which fraud can cause harm, it is not the only way to allege and prove causation under § 1964(c). *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), a civil RICO case, stated that "[i]n some cases, reliance may be 'a milepost on the road to causation.'" *Id.* at 664 (quoting *Blackie v. Barrack*, 524 F.2d 891, 906 n.22 (9th Cir. 1975) (fraud-on-the-market presumption of reliance)). But is not "the **only way** plaintiffs can establish causation in a civil RICO claim predicated on mail fraud." *Id.* at 666 (emphasis in original); *accord Living Designs,*

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the mail fraud statute is not limited to facts that would fall within the common law crime of obtaining money by false pretenses or the common law tort of deceit; indeed, it involves any form of "trick, deceit, chicane or overreaching." *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (citations omitted).

Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 363 (9th Cir. 2005) (declining to "announce a black-letter rule that reliance is the only way plaintiffs can establish causation" in RICO claim).

The Solicitor General recognizes that reliance by a third party ("someone" other than the plaintiff) will suffice to allege (and prove) causation. Three months ago, in *Bank of China v. NBM L.L.C.*, 359 F.3d 171 (2nd Cir. 2004), *cert. granted*, ___ U.S. ___, 125 S. Ct. 2956 (2005), *cert. dismissed*, ___ U.S. ___, 126 S. Ct. 675 (2005), the Solicitor General filed an *amicus curiae* brief (at this Court's request) addressing "whether civil RICO plaintiffs alleging mail and wire fraud as predicate acts must allege 'reasonable reliance' under" § 1964(c). The Solicitor General asserted that "a RICO plaintiff alleging a RICO violation based on mail or wire fraud must show reliance on the defendants' misrepresentations in order to establish that the RICO violation proximately caused its injury," explaining that a misrepresentation cannot cause injury "unless **someone** relies on it." Brief for the United States, at 8 (Oct. 31, 2005) (emphasis in original). But the Solicitor General made clear that "nothing in the language of RICO precludes the assertion" of "a theory of third-party reliance," *id.* at 9, stating that "the plaintiff must show that **either it or a third party justifiably relied** on the misrepresentations or omissions made to accomplish the fraud." *Id.* at 11.[24] Endorsing the Second Circuit's decision

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[24] *See also id.* at 12 n.7 (recognizing that "a plaintiff can establish the requisite causation by proof that **a third party relied** on the defendants' misrepresentations"); *id.* at 21 ("Civil RICO requires reliance by **someone** when the predicate offenses involve fraud in order to establish the requisite causal link between the injury and the RICO violation, but not necessarily reliance **by the plaintiff**") (second emphasis in original). The Solicitor General also observed: "[A] common law fraud claim might succeed **despite the fact that the fraudulent**

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in this case, the Solicitor General stated that "[m]any courts of appeals ... have recognized that third-party reliance is a viable avenue of causation, at least where the plaintiff is the 'direct target' of the defendant's scheme." *Id.* at 22 (citations omitted).

Here, the Second Circuit's analysis is entirely consistent with the position taken by the Solicitor General. The court below traced its post-*Holmes* RICO causation jurisprudence, JA 40-46, before stating that in cases "in which we approved the summary dismissal of the complaint, the plaintiffs were not **competitors of the racketeering enterprise or targets of alleged racketeering activity**." JA 46 (citing, *inter alia*, *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 124 (2nd Cir.), *cert. denied*, 540 U.S. 1012 (2003) ("[W]e have repeatedly emphasized that **the reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise**.") (citations omitted)).[25]

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misrepresentation was made to a third party." Brief for the United States, at 21 n.13 (quoting *Steamfitters Local Union No 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 935 n.19 (3rd Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000)). Thus, while reliance may have been required in the "ordinary misrepresentation case," Pet. Br. at 29 (which this case is not), the common law consistently recognized the doctrine of third-party reliance.

[25] Judge Posner explained "intended victim" in *Matter of EDC, Inc.*, 930 F.2d 1275 (7th Cir. 1991), in which defendants allegedly sold an unprofitable division as part of a leveraged buyout and schemed to keep the buyer afloat long enough to satisfy the Pension Benefits Guaranty Corp. ("PBGC") that the pension obligations of the seller could be assumed by the buyer. After that time, the buyer went bankrupt. Creditors of the buyer had standing to bring a RICO claim because even though the PBGC was the "primary" target, fooling the creditors was an intended step in the scheme: "**One can be an intended victim without being the primary victim.** That is this case, and it is different from a case of transferred intent. Suppose you blow up a plane carrying X and Y in order to kill X. If both die in the explosion, you are

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The view that a competitor alleging injury to its business resulting from racketeering activity of a defendant competitor adequately pleads proximate cause is consistent with the majority and minority opinions in *Sedima*, 473 U.S. at 495-96 & 497 n.15; *see also id.* at 519-20 (Marshall, J., dissenting). Post-*Holmes* decisions recognize that injured competitors that assert claims like those asserted by Ideal satisfy RICO proximate causation. In *Commercial Cleaning*, the Second Circuit reversed the dismissal of a RICO complaint alleging that plaintiff's competitor had engaged in a pattern of racketeering activity, namely, knowingly hiring undocumented aliens in violation of 8 U.S.C. § 1324, which "enabled [the defendant] to lower its variable costs and thereby underbid competing firms, which consequently lost contracts and customers to [the defendant]." 271 F.3d at 378. The court noted that the plaintiff

> was not alleging an injury that was derivative of injury to others. Commercial does not seek to recover based on the misfortunes visited upon a third person by the defendant's acts. . . . It claims to have lost profits directly as the result of [the defendant's] underbidding, which it achieved through its violation of § 1324(a). . . . **We have stated a plaintiff has standing where the plaintiff is the direct target of the RICO violation. . . . [T]he theory of Commercial's**

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just as much Y's murderer as X's, not because of the fiction of transferred intent but because you knew that Y (or any other person who might be a passenger on the plane) would die if your plot against X succeeded. It is not a transferred-intent case because nothing went wrong with your plan; it is a case of extreme recklessness, equated to deliberateness. You killed Y for an ulterior motive, it is true, but most murders have ulterior motives." *Id.* at 1279 (citations omitted). *See also Diaz v. Gates*, 420 F.3d 897, 901-02 (9th Cir. 2005).

> **claim is that Colin undertook the illegal immigrant hiring scheme in order to undercut its business rivals, thus qualifying them as direct targets of the RICO violation.**

Id. at 384. In *Baisch v. Gallina*, 346 F.3d 366 (2nd Cir. 2003), another third-party scheme to defraud RICO case, the court rejected the premise that only one category of victim has standing to sue. The foreseeability component of proximate cause is established where the plaintiff was a "target[]" and "intended victim[] of the racketeering enterprise," *id.* at 374, even if it was not the primary target or victim, and "[n]o precedent suggests that a racketeering enterprise may have only one 'target,' or that only a primary target has standing." *Id.* at 375.[26]

In addition to Second Circuit precedents, the court below relied on *Mid Atlantic*, which held that a competitor had standing to sue under RICO where the racketeering was mail fraud in communications from defendants to plaintiff's customers. 18 F.3d at 261-64; *see* JA 49-50. Plaintiff Mid Atlantic and defendant LDS were resellers of long-distance telecommunications services competing for

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[26] In *Baisch*, 346 F.3d at 372-73, the Second Circuit focused on proximate cause and eliminated any "zone-of-interest" analysis to determine standing, which the Eighth Circuit had applied independently from the proximate cause analysis adopted in *Holmes*. *See Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000), cited in Pet. Br. at 17, 22 & n.6. *Baisch* stated that proximate cause analysis "adequately incorporates the zone-of-interest test's concerns," and that "it is inappropriate to apply a zone-of-interests test independent of this circuit's proximate cause analysis." 346 F.3d at 373. Petitioners ignore *Holmes*, 503 U.S. at 280 (O'Connor, White and Stevens, JJ., concurring), which rejected a "zone-of-interest" analysis and made clear that RICO does **not** incorporate the standing requirements of the predicate acts.

the same customers. LDS engaged in a pattern of fraudulent mailings, soliciting customers by offering them artificially low rates, lower than Mid Atlantic's basic rates, forcing Mid Atlantic to meet the apparently lower LDS rates. However, "[i]n practical effect, . . . the quoted [LDS] rates were not [as] low [as had been represented], since additional minutes were randomly and artificially added [by the defendants] to the lengths of telephone calls" made by LDS customers. *Id.* at 261. LDS contended that "Mid Atlantic d[id] not allege that it received mail or telephone solicitations offering artificially low rates, merely that its customers did"; that, therefore, defendants' "customers were the only victims of the alleged fraud"; and, hence, "the [defendants'] solicitations could not have been the proximate cause of Mid Atlantic's injuries." *Id.* at 263.

The Fourth Circuit rejected these contentions and vacated dismissal of the complaint because Mid Atlantic was "not seeking [either] to vindicate the rights of its former customers who may have been offered fraudulently low rates" or to recover for injuries "derivative of any losses suffered by its former customers." *Id.* at 264. Rather, "Mid Atlantic alleges that LDS engaged in fraudulent use of the mails and telephone wires to entice customers away from Mid Atlantic and to eliminate Mid Atlantic as a competitor." *Id.* at 263. The court recognized that there may be more than one category of victims to whom a defendant's conduct can proximately cause injury, and that although the customers may have been the most direct victims of defendants' alleged frauds, Mid Atlantic "claim[ed] distinct and independent injuries: lost customers and lost revenue due to the necessity of offering lower rates to match [the defendants'] fraudulent ones." *Id.* at 264. "Mid Atlantic may be able to show that while the scheme was initially aimed only at defrauding LDS customers, [the

individual defendant] broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers)." *Id.* at 263.[27]

These cases are consistent with *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2nd Cir. 1990) ("*LILCO*"), another case cited by the court below. JA 50-51. In *LILCO*, Suffolk County asserted a RICO claim alleging that LILCO and its officers committed mail fraud in the course of Public Service Commission ("PSC") proceedings, inducing the PSC to grant LILCO unwarranted and excessive rate increases. Noting that the "by reason of" phrase in § 1964(c) "requires that there be a causal connection between the prohibited conduct and plaintiff's injury," 907 F.2d at 1311, the Second Circuit stated that "[i]n the context of this case, which involves RICO mail fraud claims, this means that it was necessary for **Suffolk** to demonstrate at trial that LILCO's misrepresentations to the PSC **were relied upon by the PSC."** *Id.* (emphasis added). The Second Circuit plainly recognized that a plaintiff who is injured as a proximate result of fraud should be able to recover **regardless of whether he or a third party is the one deceived**. Petitioners ignore *LILCO*, even though it was cited with approval in *Holmes*.[28]

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[27] *Accord Pharmacare v. Caremark*, 965 F. Supp. 1411, 1421 (D. Haw. 1996) (defendants bribed physicians to induce them to prescribe defendants' product rather than plaintiffs' product, citing *Mid Atlantic*, court holds that proximate causation satisfied; "Defendants' alleged perpetration of fraud on its patients could foreseeably affect the Plaintiffs who are also trying to entice those same customers"; "In addition, Plaintiffs have pled that they were the targets of the fraud.").

[28] *Holmes*, 503 U.S. at 272 n.19, recognized that customers of the broker-dealers who had purchased manipulated securities "were

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After citing the relevant precedents, JA 51-53, the Second Circuit delineated "the principle governing" the present case:

> [W]here a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim. **This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.**

JA 53 (emphasis added). Contrary to Petitioners' assertion (Pet. Brief 23-24), the court correctly applied the governing principle to Ideal's allegations:

> Ideal alleged facts sufficient to show that its claimed loss of business was proximately caused by defendants' operation of National's stores

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victims of" Holmes' schemes to defraud, including securities "parking" transactions. In support of the proposition that "the broker-dealers' customers might be proximately injured by" offenses of mail fraud, wire fraud and securities fraud, *id.*, this Court cited *LILCO*, 907 F.2d at 1311-12, and *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991). In *Taffet*, utility customers asserted RICO claims against utilities that had engaged in fraud that resulted in higher rates, namely, subverting the ratemaking process by presenting false and misleading information to the Alabama and Georgia Public Service Commissions ("PSC") via mail and wire fraud. 930 F.3d at 850. Reversing dismissal of RICO claims on the ground that customers failed to assert cognizable injury proximately caused by the utilities' scheme to defraud, the Eleventh Circuit stated that "**the plaintiffs cannot be said to have no cognizable right to pay anything but the fraud-induced rate. The cognizable injury is therefore money lost as a result of fraud upon the state agency.**" *Id.* at 857 (emphasis added).

> through a pattern of racketeering activity. . . . [D]efendants' "cash, no tax" scheme was implemented for the purpose of diverting customers from Ideal, which collected the sales taxes required by law, to National, which did not. Given that Ideal and National sell substantially the same products and that their retail stores are but minutes apart, the lower bottom-line cost available to cash purchasers from National as a result of not paying sales tax influenced some customers to purchase from National rather than from Ideal.
>
> Defendants' mailings or electronic transmissions of fraudulent sales tax reports to the State Tax Department were an essential part of the "cash, no tax" scheme, for without the fraudulent reports, and the State's reliance on them, defendants would have had to pay the uncollected sales taxes out of their own assets. **The principal intended victim of the scheme was Ideal**, over which defendants sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. . . . **Ideal, as a competitor directly targeted by defendants for competitive injury, has standing to assert its RICO claims against defendants** for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud.

JA 53-54 (emphasis added).[29]

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[29] *Accord City of New York v. Cyco.Net, Inc.*, 383 F Supp. 2d 526, 556-60 (S.D.N.Y. 2005) (city's RICO action alleged that out-of-state vendors conspired to sell cigarettes to city residents via the Internet without paying state taxes; "the fact that the State [of New York], a

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Other courts recognize that a business entity injured by a campaign of misinformation, bribes, or other wrongful activity directed at its customers suffers an injury to its "business or property" that is proximately caused by the competitor's pattern of racketeering activity, especially where it alleges that it was the **direct target** of the scheme.[30] In *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), the Fifth Circuit reversed the dismissal of RICO claims asserted by household products manufacturer P&G against its competitor arising out of Amway distributors' dissemination to customers, via mail and wire fraud, of rumors of P&G's link to Satanism. *Id.* at 542-44, 564. P&G's RICO claims were dismissed because it could not "claim to have relied on any of the misrepresentations that Amway allegedly make via mail and wire." *Id.* at 564. Following *Mid Atlantic* and its own pronouncement in *Summit Props.* that a "target" of a scheme to defraud that did not itself rely on the fraud may pursue a civil RICO claims if other elements of proximate causation are

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third party, was deceived, has no bearing on the question of proximate cause").

[30] *See, e.g., Israel Travel Adv. Svc., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995) ("we . . . accept *Mid Atlantic*"); *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 151-52 (5th Cir. 1997) (same), *vacated on other grounds as moot*, 525 U.S. 979 (1998); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 521 (3rd Cir. 1998) (commercial bribery and extortion designed to steal plaintiff's customer; plaintiff's business relationship with customer was "direct target of the alleged scheme – indeed, interference with that relationship may well be deemed the linchpin of the scheme's success"); *Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000) (recognizing that "defendants' competitors might recover for injuries to [their] competitive position"); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 221-24 (5th Cir. 2003) (same).

present, the Fifth Circuit said that third-party reliance more than suffices: "P&G has alleged that using the wire and the mail, Amway attempted to lure P&G's customers away by fraud. Although P&G did not rely on the fraud, . . . if P&G's customers relied on the fraudulent rumor in making decisions to boycott P&G products, this reliance suffices to show proximate causation." 242 F.3d at 565. These cases recognize that it matters not what form the defendant's wrongful (or anti-competitive) conduct might take – whether threats of violence, extortion, bribery, or misrepresentations – but to the extent that "reliance" is required, third-party reliance will suffice and the RICO claim must be upheld.[31]

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[31] *See, e.g., Cox*, 17 F.3d at 1398-1403 (bribes in form of personal pension benefits, granted by employer to union negotiators, caused RICO injury to union members who returned to work under less favorable conditions); *Advance Relocation & Storage Co. v. Local 814, Int'l Brotherhood of Teamsters, AFL-CIO*, 2005 WL 665119, *4 (E.D.N.Y Mar. 22, 2005) (extortion and threats of violence "aimed at limiting competition" in commercial moving industry), *Dooley v Crab Boat Owners Ass'n*, 2004 WL 902361, *7 (N.D. Cal Apr 26, 2004) (same; crab harvesting industry); *Southern Intermodal Logistics, Inc. v D J. Powers Co.*, 10 F. Supp. 2d 1337, 1355-56 (S.D Ga 1998) (misrepresentations to potential customers); *In re Amer. Cont. Corp./Lincoln Savs & Loan Secs Litig.*, 794 F. Supp. 1424, 1465 (D. Ariz. 1992) (misrepresentations and undue political influence to deceive or fend off regulators so fraudulent sales of securities could continue); *Texas Air Corp. v. Air Line Pilots Ass'n Int'l*, 1989 WL 146414, *4-5 (S.D Fla. July 14, 1989) (misrepresentations to government agencies, public and airline employees); *Lewis v. Lhu*, 696 F. Supp. 723, 727-28 (D D.C. 1988) (misrepresentations and threats to customers); *Shaw v. Rolex Watch U S.A., Inc.*, 726 F. Supp. 969, 971-73 (S.D.N Y. 1989) (misrepresentations to Customs officials), *Galeria Furstenberg v. Coffaro*, 697 F. Supp. 1282, 1286-87 (S.D N.Y. 1988) (misrepresentations to customers), *SJ Advanced Tech & Mfg. Corp v. Junkunc*, 627 F. Supp. 572, 576 (N.D. Ill. 1986) (misrepresentations to government agencies), 2 Mathews, CIVIL RICO LITIGATION § 8.04[C][3][b][i]-[ii] (RICO claims brought by injured competitors).

D. At Common Law, Ideal Could Maintain A Fraud And Deceit Claim By Alleging And Proving Third-Party Justifiable Reliance

Third-party reliance has deep roots in common law fraud actions, manifested in an unbroken line of cases stretching back more than 130 years and not cabined to "limited exceptions." Pet. Br. at 33-34. In *Rice v. Manley*, 66 N.Y. 82, 87 (1876), a seller agreed by unenforceable contract to sell certain cheese to the plaintiffs. The defendant falsely represented to the seller that the plaintiffs no longer wanted the cheese and the seller, induced thereby, sold the cheese to the defendant instead. The Court of Appeals held that a fraud action was maintainable: "[I]t matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce the injury, or whether it be direct or indirect in its consequences." This was the rule followed at common law because "[w]here defendant's fraud adversely affects plaintiff through inducing action by a third person, denying recovery on the ground that there has been no actual reliance by the plaintiff is hard[] to justify." 2 Fowler V. Harper & Fleming James, Jr., THE LAW OF TORTS § 7.13, at 470 (2nd ed. 1986) ("Harper & James, LAW OF TORTS").[32]

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[32] The treatise cites *Rosenbluth v. Sackadorf*, 76 N.Y.S.2d 447 (Sup. Ct. 1947), *rev'd on other grounds*, 79 N.Y.S.2d 524 (App. Div. 1948), in which landlords made fraudulent misstatements to the Office of Price Administration ("OPA") and to the court in order to evict a tenant who was protected in occupancy by federal statutes except where the premises were wanted for certain limited purposes (*e.g.*, self-occupancy). The landlords (like Petitioners here) asserted that if any fraud were committed by them, it was against the OPA and the court and not against the plaintiff. 76 N.Y.S.2d at 449. Because the "defendants' ultimate motive was to defraud the plaintiff," the court stated

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Three years ago, the Supreme Court of New York cited *Rice* (among other early New York cases) for the proposition that it is "relatively well settled" that "fraud may exist where a false representation is made to a third party, resulting in injury to the plaintiff." *Ruffing v. Union Carbide Corp.*, 764 N.Y.S. 2d 462, 465 (App. Div. 2003). *Ruffing* held that a surviving child who was injured *in utero* as the result of a fraudulent statement relied upon by his mother had a valid fraud action. *Id.* at 466-67. Other recent New York cases agree. *See Desser v. Schatz*, 581 N.Y.S. 2d 796, 797 (App. Div. 1992) ("[D]efendants . . . falsely stated to Chemical that a mortgage was fully paid up when it was not. . . . Reliance by Chemical, to the clear detriment of plaintiff, is manifest, and it is of no moment, in this context, that the false representation was not made directly to plaintiff."); *Buxton Mfg. Co. v. Valiant Moving & Storage, Inc.*, 657 N.Y.S. 2d 450, 451 (App. Div. 1997) ("It is generally the case that a cause of action to recover damages for fraud requires, *inter alia*, a showing that a false representation was made to the injured party, for the purpose of inducing reliance thereon, and reasonable reliance by the injured party. . . . **Fraud, however, may also exist where a false representation is made to a third party, resulting in injury to the plaintiff.**") (citations omitted).[33]

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that "[t]heir liability to the plaintiff . . is the same as if the false representations had been made directly to him." *Id.* (citing, *inter alia*, *Eaton Cole & Burnham Co. v. Avery*, 83 N.Y. 31, 33-34 (1880) (third-party reliance is sufficient to sustain common law fraud claim) (cited in Pet. Br. at 33 n.9)); *see also Bruff v. Mali*, 36 N.Y. 200, 205-06 (1867) (same).

[33] *See also Cooper v. Weisblatt*, 277 N.Y.S. 709, 714 (App. Div. 1935) (fraud was sufficiently alleged where the plaintiff agreed to have claims against him resolved by "Din Torah" before a tribunal of three rabbis

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In contending that such third-party reliance is "unprecedented" under the common law, Petitioners ignore over 130 years of New York case law. *Compare* Pet. Br. at 31-34 *with N.B. Garments (Pvt.) Ltd. v. Kids Int'l Corp.*, 2004 WL 444555, *3 n.5 (S.D.N.Y. Mar. 10, 2004) ("**New York law has, since the 1800's, allowed for fraud claims based on third-party reliance.**") (citations omitted). The rule followed by the Second Circuit in this case (JA 53-54) is consistent with the common law of fraud applied since the 19th Century.[34]

E. Under The Restatement, The Intentional Nature Of Petitioners' Racketeering Scheme Must Be Taken Into Account In Determining Whether Proximate Causation Has Been Alleged

Common law proximate causation drew sharping distinctions between acts that are deliberate and intentional and those involving mere negligence. Contrary to Petitioners' assertion, *see* Pet. Br. at 11, 31-32, that their motive and intent is irrelevant, the law has a strong

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and defendants fraudulently induced two of the rabbis' signatures on fictitious decision providing that mortgage held by plaintiff should be discharged), *Piper v Hoard*, 107 N.Y. 73, 79 (1887) (where marriage was fraudulently induced by defendant's misrepresentation that any child of marriage would inherit certain property, such child later born may sue as "the very person injured by the fraud").

[34] Supposedly contrary cases cited by Petitioners actually "address situations presenting a risk of far-flung liability for inchoate or unintended injuries." *Fromer v. Yogel*, 50 F. Supp 2d 227, 243 (S.D.N.Y. 1999) (citations omitted). "[I]ndirect reliance is insufficient when a plaintiff's injury is an unintended or remote consequence of a defendant's misrepresentations." *Id.* at 244. Because Ideal's injuries are an intended consequence of the racketeering scheme, even Petitioners' cases permit recovery.

interest in deterring intentional efforts to harm others. The RESTATEMENT (SECOND) OF TORTS widens the scope of liability for intentional acts, particularly where there is a high degree of moral culpability. Under Sections 435A and 435B,[35] liability for unintended resulting harm is based upon proof of the tortfeasor's wrongful intent, consideration of the degree of moral wrong, and the seriousness of the harm which he intended. *Mayer v. Town of Hampton*, 497 A.2d 1206, 1210 (N.H. 1985) (citations omitted). Although Petitioners assert that the RESTATEMENT is "the most widely accepted distillation of the common law of torts," Pet. Br. at 27 n.7 (quoting *Field v. Mans*, 516 U.S. 59, 70 (1995)), they ignore Sections 435A and 435B.[36]

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[35] With most cases of intentional torts, "[t]he defendant's liability for the resulting harm extends . . . to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim." Keeton, THE LAW OF TORTS, § 9 at 40 (footnote omitted). Sections 435A and 435B relate to causation and liability: "A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable, except where the harm results from an outside force the risk of which is not increased by the defendant's act." RESTATEMENT § 435A. This section recognizes "a cause of action in favor of a person where the defendant acted for the purpose of harming him," such as "**where a person defrauds another for the purpose of causing pecuniary harm to a third person.**" *Id.*, cmt. A (citing RESTATEMENT § 870). "Where a person has intentionally invaded the legally protected interests of another, his intention to commit an invasion, the degree of his moral wrong in acting, and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting unintended harm." *Id.*, § 435B.

[36] The traditional rule stated. "Where the plaintiff sustains injury from the defendant's conduct to a third person it is too remote, . . **unless the wrongful act is willful for that purpose.**" J G Sutherland, A TREATISE ON THE LAW OF DAMAGES 68 (2nd ed 1893) Sutherland's 1916 treatise elaborated on "willful for that purpose." J G.

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Petitioners' "cash, no tax" scheme can only be characterized as a criminal fraud. The degree of Petitioners' moral wrong, and the seriousness of the financial injury they inflicted upon Ideal, are factors that weigh heavily in favor of finding proximate causation in this case.

F. Affirming The Second Circuit's Decision Will Not Open "Floodgates" Of RICO Litigation

In a last-ditch effort to convince this Court to rewrite the statute, abandon its precedents overturn the decision of the court below, Petitioners summon the oft-cited parade of horribles that will befall the federal courts when they are accordingly beset by RICO claims. Petitioners cite a speech delivered by former Chief Justice Rehnquist in 1989, Pet. Br. at 35-36, ignoring the majority opinion he authored in *NOW I* five years later: "'[T]he fact that RICO has been applied in situations not expressly anticipated by

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Sutherland, A TREATISE ON THE LAW OF DAMAGES 128 (John R Berryman, ed., 4th ed. 1916). That edition used an illustration in which defendant induced a ship captain to move his ship. The captain, believing defendant to be the harbor master, followed the instruction. The plaintiff – the wharf owner who suffered a loss of rent – was allowed to recover "if the defendant acted with a malicious and fraudulent design to injure the plaintiff." *Id.* (citing *Gregory v Brooks*, 35 Conn 437, 446 (1868)), *see also Derosier v. New England Tel. & Tel Co.*, 130 A 145, 152 (N.H. 1925) ("For an intended injury, the law is astute to discover even very remote causation."); *Burckhardt v. Burckhardt*, 42 Ohio St 474, 487 (1885) ("In cases of willful or malicious injury, and injury from reckless or illegal acts, or from positive fraud, the damages are not so strictly confined to proximate consequences as when these elements do not exist. . . ."); 2 Harper and James., LAW OF TORTS, § 6.1 at 270 ("If the harm was intentionally caused by the defendant, there is no difficulty about the problem of legal causation, since all intended consequences are legal or proximate.") (footnote omitted); *id*, vol 4, § 20 5 at 133 n.1 ("Foreseeability is not a limitation on liability for intended consequences, which are always proximate") (citation omitted).

Congress does not demonstrate ambiguity. It demonstrates breadth.'" 510 U.S. at 262 (quoting *Sedima*, 473 U.S. at 499). Concurring in the majority opinion in *Holmes*, Justices O'Connor, White and Stevens stated that "if Congress ha[s] legislated the elements of a private cause of action for damages, the duty of the Judicial Branch [is] to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability." 503 U.S. at 285 (citation omitted). Petitioners' complaints about RICO's deliberately broad reach (Pet. Br. at 35-36, 41-43) should be directed to Congress, not this Court.

Nor can Petitioners complain about the supposed volume of RICO litigation supposedly clogging the federal courts, Pet. Br. at 41-43, because RICO cases make up an almost infinitesimal portion of federal court civil dockets:

U.S. District Courts – Civil Cases Commenced on Basis of Jurisdiction and Nature of Suit, During 12-Month Periods Ending March 31, 2001-March 31, 2005

Type of Case	2001	2002	2003	2004	2005	Avg.
Civil Cases	**254,523**	**265,091**	**256,858**	**255,851**	**278,712**	**262,207**
Contract	48,927	38,535	33,288	30,512	28,652	35,983
Tort	34,424	52,366	46,629	45,891	52,489	46,360
ERISA	9,633	10,787	11,229	11,499	11,391	10,908
Securities	2,831	3,595	3,468	3,100	2,707	3,140
Antitrust	810	709	863	715	792	778
RICO	**791**	**707**	**845**	**695**	**840**	**776**

U.S. Admin. Office of Courts, FEDERAL JUDICIAL CASELOAD STATISTICS, Table C-2 (Mar. 31, 2001-Mar. 31, 2005). RICO cases represent less than 0.03% of federal case filings, and their incidence has dropped by about one-third since 1996. Blakey & Roddy, *Reflections*, 33 AMER. CRIM. L. REV. at 1616.

There is nothing inconsistent between the Second Circuit's analysis of Petitioners' anti-competitive behavior, JA 53-54, and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128 (1998). Although antitrust, RICO and state law unfair competition or tort claims can arise from the same anti-competitive conduct, *see Agency Holding Corp.*, 483 U.S. at 145-46, 149, 151-53, such claims involve entirely different elements. Antitrust and RICO claims require separate analysis, as set forth in *Nynex*, where the Second Circuit found that plaintiff had sufficiently alleged antitrust claims but had not alleged RICO claims. *Discon, Inc. v. Nynex Corp.*, 93 F.3d 1055, 1058-62 (2nd Cir. 1996) (antitrust claims); *id.* at 1062-64 (RICO claims), *vacated sub nom.*, 525 U.S. 128 (1998); *see also Z-Tel Comm., Inc. v. SBC Comm., Inc.*, 331 F. Supp. 513, 521-48, 557-63 (E.D. Tex. 2004) (offering separate analysis of antitrust and RICO claims).

Recognizing Ideal's standing to sue Petitioners will not open the floodgates of "accounting fraud" RICO litigation any wider than that permitted by *Reves*, 507 U.S. at 183, because professionals cannot be held liable under § 1962(c) unless they "participate[] in the operation or management of the enterprise itself." Congress removed the predicate act of "fraud in the sale of securities" more than a decade ago, when it enacted the Private Securities Litigation Reform Act of 1995. *Compare* 18 U.S.C.

§ 1964(c) and *In re Enron Corp. Secs., Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511, 618-24 (S.D. Tex. 2003) *with* Pet. Br. at 40-41. The fact that Petitioners cannot cite a single civil RICO case brought by a competitor alleging a corporate defendant's "accounting fraud" scheme (Pet. Br. at 42-43 & n.12) shows how fanciful this hypothetical is.

CONCLUSION

For the reasons stated herein, the judgment of the Second Circuit should be affirmed, and this case should be remanded to the district court for trial.

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Respectfully submitted,

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